IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 09-0682

JEANETTE DIAZ, LEAH HOFFMAN-BERNHARDT, RACHEL LAUDON, individually and on behalf of others similarly situated,

Plaintiffs and Appellants,

v.

BLUE CROSS AND BLUE SHIELD OF MONTANA, INC., NEW WEST HEALTH SERVICES, MONTANA COMPREHENSIVE HEALTH ASSOCIATION, STATE OF MONTANA, AND JOHN DOES 1-100

Defendants and Appellees.

BLUE CROSS BLUE SHIELD OF MONTANA, INC.'S RESPONSE BRIEF

Appeal from the District Court of the First Judicial District
of the State of Montana in and for the County of Lewis and Clark
Cause No. BDV-2008-956
The Honorable Jeffrey Sherlock

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TABLE OF CONTENTS

I. **ISSUES PRESENTED FOR REVIEW** 1

II. **STATEMENT OF THE CASE** 1

III. **STATEMENT OF THE FACTS** 2

IV. **STANDARD OF REVIEW** 3

V. **SUMMARY OF THE ARGUMENT** 3

VI. **ARGUMENT** 6

A. Proposed class is as against the State of Montana; Blue Cross Blue Shield of Montana ("BCBSMT") is merely the Third Party Administrator 6

1. BCBSMT's fully insured plans are irrelevant 8

B. Class definition, rules 23(a) and (b) control the analysis of class certification 9

1. The putative class lacks sufficient definition. 11

2. The putative class lacks numerosity. 15

3. The putative class lacks commonality. 16

4. The putative class lacks typicality. 22

5. The representative Appellants do not adequately represent the proposed class. 23

6. The class does not satisfy Rule 23(b). 24

a. If the statutory subrogation provisions control, more individualized determinations are necessary 25

b. Certification under Rule 23(b)(3) has been waived, but is not appropriate in any event 26

C. The district court did not improperly delve into the merits 27

VII. CONCLUSION 29

APPENDIX

TABLE OF AUTHORITIES

CASES

Bailey v. Patterson,
369 U.S. 31 (1962) 22

Burton v. Mountain West Bureau Mut. Ins. Co.,
214 F.R.D. 598 (D. Mont. 2003) 24, 27

DeBremaecker v. Short,
433 F.2d 733 (5th Cir. 1970) 12, 13-14

Easter v. American West Fin.,
381 F.3d 948 (9th Cir. 2004) 22

Ferguson v. Safeco,
2008 MT 109, 342 Mont. 380, 180 P.3d 1164 . . . . . 18-19, 20, 24

Foster v. City of Oakland,
2009 U.S. Dist. LEXIS 1970 (N.D. Cal.) 12

Gonzales v. Montana Power Co.,
2010 MT 117, __ Mont. __, __ P.3d __ 14

Jordan v. County of Los Angeles,
669 F.2d 1311 (9th Cir. 1982) 22

LaMar v. H&B Novelty and Loan Co,
489 F.2d 461 (9th Cir. 1973) 22, 23

Mattson v. Mont. Power Co.,
2009 MT 286, 352 Mont. 212, 215 P.3d 675 27-28

McDonald v. Washington,
261 Mont. 392, 862 P.2d 1150 (1993) 3, 10, 11, 22

Morrison v. Blue Cross Blue Shield of Montana, Inc.
2008 MT 16, 341 Mont. 147, 176 P.3d 1027 . . . . . 25, 26

Murer v. Montana State Compensation Mut. Ins. Fund,
257 Mont. 434, 849 P.2d 1036 . . . . . 10, 22, 23

Newell v. State Farm Gen. Insur. Co.,
118 Cal. App. 4th 1094 (Cal. App. 2004) 18

Polich v. Burlington Northern, Inc.,
116 F.R.D. 258 (1987). 11, 15, 16, 17

Ridley v. Guaranty Nat'l Ins. Co.,
286 Mont. 325, 951 P.2d 987 (1998) 14, 18, 21

Seiglock v. Burlington Northern Santa Fee Railway Company,
2003 MT 355, 319 Mont. 8, 81 P.3d 495 ..... 10, 11

Thayer v. Uninsured Employers' Fund,
1999 MT 304, 297 Mont. 179, 991 P.2d 447 20

Thompson v. Board of Ed. of Romeo Community Schools,
709 F.2d 1200 (6th Cir. 1983) 23

Youngblood v. American States Insurance,
262 Mont. 391, 866 P.2d 203 (1993) 21

Zacher v. American Ins. Co.,
243 Mont. 226, 794 P.2d 335 (1990) 21

MONTANA CODE ANNOTATED

M.C.A. § 2-18-812 (2009) 12

M.C.A. § 2-18-902 (2009) 25, 26

MONTANA RULES OF CIVIL PROCEDURE

M.R.Civ.P. Rule 23 ..... 5, 6, 10, 12, 13, 22, 24, 25, 26, 27

MONTANA RULES OF EVIDENCE

M.R.Evid. 201 5

M.R.Evid. 402 8

M.R.Evid. 403 8

MONTANA RULES OF PROFESSIONAL RESPONSIBILITY

M.R.P.C. Rule 3.7 16

OTHER SOURCES

BLACK'S LAW DICTIONARY 1427 (6th Ed. 1990) 20

I. ISSUES PRESENTED FOR REVIEW

A. Whether the district court was correct in denying class certification?

B. Whether the district court improperly delved into the merits?

II. STATEMENT OF THE CASE

Appellants Jeannette Diaz and Leah-Hoffman Bernhardt[1] filed an action against the State of Montana,Blue Cross Blue Shield of Montana ("BCBSMT), the Montana Comprehensive Health Association ("MCHA") and New West Health Services ("NWHS"). Appendix 1. The complaint alleges breach of contract by violating the Plaintiff's "made whole" rights, unjust enrichment, and seeks a declaratory ruling regarding the Appellants' right to be "made whole". Importantly to this appeal, the complaint also seeks class relief. The complaint seeks a class composed of members of the plans owned or administered by the Defendants. The State of Montana was the employer of both Appellants, and as a result they were members of the State's employee benefit plan at the time they suffered injuries in separate and unrelated car accidents.

After suit was filed, Appellants filed a motion to amend the complaint, seeking to add claims against all Defendants to include fraud, bad faith, punitive damages, statutory breach of contract, and deceit. Appendix 2. Thereafter, before ruling by the district court, the Appellants moved for class certification. Before the hearing on class certification, Appellants moved for partial summary judgment, and BCBSMT also moved for summary judgment. None of those motions were

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[1] Rachel Loudon settled her claims against the Montana Comprehensive Health Association and BCBSMT, and as a result neither is party to this suit following this appeal.

addressed by the district court, which held a hearing on class certification in August 2009. After a hearing in which evidence was presented and arguments had, the district court denied class certification, correctly determining that the class issues did not predominate over individual issues. Appendix 5. This appealed follow, and the motion to amend, and motions for summary judgment, remain undecided.

III. STATEMENT OF THE FACTS

BCBSMT is a health services corporation, and operates as a non-profit entity. Appendix 1, Complaint (Compl.), ¶ 2. It offers a variety of disability insurance products to consumers, which is perhaps what the Blue Cross Blue Shield brand is most recognized for in Montana. However, it also offers administrative services to entities, such as the State of Montana, which offer their own disability/health programs. Transcript ("T.") 105:1-12. Such programs are often referred to as "self-funded," because while they have assistance in managing their plan, it is the plan itself which assumes the risk of loss, pays claims, drafts and adopts plan terms, sets the rules for membership, and is responsible for the plan's function and operation. T. 106:10-25, 107:1. When operating as a service provider to self-insured plans, BCBSMT uses its resources, including the software programs that process claims, to help the self-insurer manage their plan. *Id.* It also provides it personnel and experience in plan management. *Id.* When operating in such a Third Party Administrator ("TPA") role, BCBSMT does not insure or otherwise assume risk related to claims by members of the plan. T. 106:22-25, 107:1-16.

The State plan was comprised entirely of state employees and their families. Jeannette Diaz was such a member of the State of Montana's self-insured plan when she was involved in a car accident. In accordance with the terms of her policy, BCBSMT, as TPA, processed Ms. Diaz's claim as provided by the plan documents and as instructed by the State. T. 123:3-16. Since BCBSMT does not invest in profits of the State plan, offer any insurance or reinsurance, or otherwise share in the risk of loss, it neither profited nor lost as a result of applying the plan's terms. T. 105:4-9.

Leah Hoffman-Bernhardt is also a member of the State plan, but her plan is administered by NWHS. Appendix 6, Plaintiffs Response to BCBSMT First Discovery Requests, p. 12. As a result, she has no claim against BCBSMT, and is not a representative of any putative class which may possibly include BCBSMT.

IV. STANDARD OF REVIEW

Trial courts have the broadest discretion when deciding whether to certify a class. *McDonald v. Washington*, 261 Mont. 392, 399, 862 P.2d 1150, 1154 (1993). The judgment of the trial court should be accorded the greatest respect because it is in the best position to consider the most fair and efficient procedure for conducting any given litigation. *McDonald*, 261 Mont. at 399-400, 862 P.2d at 1154. Therefore, an appellate court will not disturb a trial court's ruling on a motion to certify, unless there is an abuse of discretion. *Id.*

V. SUMMARY OF THE ARGUMENT

This action is brought by Appellants purporting to seek monetary damages, couched partially in the form of injunctive relief, represented by medical benefits

denied by benefit plans operated by the State of Montana. The exclusion, based upon automobile med pay provisions, are contained in the Appellants' respective State of Montana plans. The complaint seeks declaratory relief for the individuals, and for the class, that the Defendants violated the individual Plaintiffs and class members right to be "made whole," and for recovery under the theory of unjust enrichment the medical payments that would have been made but for the payment of medical expenses by a third party. Appendix 1.

BCBSMT is named because it is TPA for a portion of the State of Montana Employee Benefit Plan. Though irrelevant to the subject matter of these proceedings, BCBSMT is also engaged in litigation in several courts regarding its own fully-insured plans. The parties, pleadings and issues are different. The most important distinction is that in those cases, BCBSMT is or was the insurer of the respective Plaintiffs. In this case, BCBSMT is merely an agent of the State of Montana. It is undisputed that no Appellant is actually insured by BCBSMT. Its only role with regard to the Appellants is as a TPA, and that role is limited to Ms. Diaz. Neither Ms. Diaz nor Ms. Hoffman-Bernhardt contracts with BCBSMT, and Ms. Hoffman-Bernhardt has admitted she has no claim against BCBSMT at all.

Admittedly, the Appellants sought to include in the class that would include the fully insured plans of BCBSMT and NWHS, but the district court rightly rejected that notion. The only putative class could include plans which the Appellants can adequately represent - i.e., the State of Montana. That BCBSMT has settled, with conditional approval, the class claims which include its fully-

insured members is irrelevant.[2] While Second Judicial District Court correctly determined that Ms. Diaz is not a BCBSMT fully insured member, and thus not a part of the class action before it. The orders attached to this appendix close the door on any claims that Ms. Diaz is a class representative of any class which does not include the State plan, and only the State plan. The class of BCBSMT fully insured has been certified in the Second Judicial District Court, subject to objections from class members and a fairness hearing set for September 27, 2010. Appendix 3.

Furthermore, as a TPA, BCBSMT is paid on a flat fee basis - per member of the State's plan - and does not share the risk of loss or profit with the State plan. Appellants causes of action against the State - breach of contract and unjust enrichment - don't lie against BCBSMT because it neither contracts with it nor does BCBSMT have any money to disgorge. BCBSMT serves merely as a conduit for the State's money flowing from the State plan and its members to their medical providers. Because the Appellants contract for benefits is with the State of Montana, class certification as to BCBSMT is not appropriate.

Even as against the State, the Appellants class definition is so ambiguous and imprecise as to render it unworkable for certification under Rule 23, Montana Rules of Civil Procedure. The district court's distillation of the class definition renders the class subject to individualized determinations. Furthermore, the class

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[2] The applicable portions of the State court pleadings are being provided in the appendix on the grounds that this Court has the authority to take judicial notice of "records of any court of this state or of any court of record of the United States." M. R. Evid. 201(b)(6).

definition and associated claims made, including those in a pending motion to amend, are not suited to class certification as individualized issues abound. As a result, the class cannot satisfy the requirements of Rule 23, M. R. Civ. P. and BCBSMT respectfully requests this Honorable Court affirm the district court's ruling on Class Certification.

VI. ARGUMENT

A. Proposed class is as against the State of Montana; BCBSMT is merely the Third Party Administrator

Much of Appellants' brief is focused on BCBSMT's actions in unrelated cases. However, Appellants concede they are members of the State of Montana employee self-funded welfare benefit plan. Appendix 1, Compl., pp. 2, 5; Appellants' Opening Brief, p. 3. Neither Ms. Diaz nor Ms. Hoffman-Barnhardt are BCBSMT fully insured members, and can make no claim that they are.[3] It is undisputed that BCBSMT is merely a TPA for the State's employee welfare benefit plan. *Id.* So the focus on BCBSMT is misleading. BCBSMT does not decide or write the terms of the State plan. It acts solely as an agent to the State in the processing of claims, without discretionary authority. While BCBSMT no longer enforces the disputed exclusion in its fully insured claims, when acting as a TPA for self-insured claims, it simply follow the directive of its client. T. 123.

In this case, the State is the client. While the issue of whether the State's auto and premises exclusion is not before this Court, BCBSMT cannot make a

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[3] In fact, Ms. Hoffman-Bernhardt has conceded that she has no claim against BCBSMT, since it was never the TPA for her state medical benefits plan, and she is not a member of a BCBSMT insured plan.

determination on behalf of its clients about the terms of their plans. *Id.* Nor can it vary the terms of the plan without permission from the State. When, for example, there is a subrogation question, or a question of application of plan terms comes up, they are referred to the State for handling. T. 105, 182, 206. BCBSMT is paid on a flat fee basis. T. 105, 106-107. BCBSMT assumes no risk with regard to the State plan. T. 107-108. It also receives no profit when the State saves money. T. 105.

BCBSMT is purely the processing agent for the State of Montana. T. 105: 4-5. The State's plan is not a BCBSMT "fully-insured" plan. *Id.* BCBSMT does not own the plan, and funds used to pay providers do not belong to BCBSMT. T. 105:5-6.

Appellants' complaint alleges breach of contract and unjust enrichment claims against the State, BCBSMT, and NWHS. Compl., p. 6. Since neither BCBSMT nor NWHS contracted with the Appellants, nor did they receive any financial benefit, it serves that no class can be certified against them as no claim lies against them. At most, class relief could only establish for BCBSMT and NWHS what the State has the authority to do - instruct their TPA to process claims in a different manner. Because of this, the declaratory judgment action also does not require BCBSMT to be a party to effectuate relief, if any is forthcoming.

By analogy, if this Court directed in declaratory action that State Farm could no longer sell policies with less than a $100,000 policy, limit, it is axoimatic that each and every State Farm insurance agent in Montana would not need to be named as a party. State Farm would simply direct its agents not to sell that

particular policy. Similarly, here, if the Appellants are successful in their declaratory judgment action, the State would only have to direct BCBSMT to make the necessary changes in the administration of the plan.

Because BCBSMT is not a necessary party to this action for which the Appellants have no direct claim, it serves that the district court properly denied class certification against BCBSMT.

1. BCBSMT's fully insured plans are irrelevant.

Appellants attach to their opening brief an appendix with pleadings from other cases against BCBSMT in its capacity as an insurer. While BCBSMT objected to the inclusion of items outside the record, this Court determined it had the authority under the Montana Rules of Evidence to receive and presumably review the appendix. Under Rules 402 and 403 of the Montana Rules of Evidence, in order to be admissible, evidence, including judicial notice, must be relevant. The fact that BCBSMT is engaged in litigation with other parties, regarding different insurance plans, does not make such evidence relevant to this proceeding. It is undisputed that BCBSMT's sole function in the case at bar is as a TPA.

The unrelated and extraneous cases included in Appellants' appendix, which highlight BCBSMT's role as an insurer, distracts this Court of present conditions and issues. The State of Montana, Appellants, NWHS and MCHA are not parties to those actions. The pleadings in those cases are different from the pleadings in this case, including the class definition and requested relief. The only commonality (other than the attorneys) is that all the cases seek class relief, and

involve the "made whole" doctrines. Certainly the State and NWHS will object to the use of pleadings and rulings in which they had no participation, have no interest, and no opportunity to be heard.

While BCBSMT retains the right to defend the cases in which it is sued in its capacity as an insurer in a manner different from those in which it is merely an agent, nothing of importance can be taken from unrelated cases. That BCBSMT has preliminarily settled by stipulation a class against in which it is a party for its fully-insured plans has no effect on this case.

B. Class definition, rules 23(a) and (b) control the analysis of class certification.

Certification of class actions is governed by Rule 23 of the Montana Rules of Civil Procedure.

One or more members of a class may sue or be sued as representative parties on behalf of all **only if:**

> (1) the class is so numerous that joinder of all members is impracticable,
>
> (2) there are questions of law or fact common to the class,
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

Rule 23(a), M.R.Civ.P. (emphasis added). Additionally, Rule 23(b) provides that:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of,

> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or
>
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Rule 23(B), M.R. Civ. P. The court must find that all four elements of 23(a) applies in order to proceed to the Rule 23(b) analysis. *Seiglock v. Burlington Northern Santa Fee Railway Company*, 2003 MT 355, ¶ 10, 319 Mont. 8, 13, 81 P.3d 495, 498 (2003). The Appellants bear the burden of proving all the Rule 23 elements necessary to certify the class. *McDonald*, 261 Mont. at 400, 862 P.2d at 1154. Failure to prove any one element of the requirements for class certification must result in denial of the class. *Murer v. Montana State Compensation Mut. Ins. Fund*, 257 Mont. 434, 436, 849 P.2d 1036, 1037. In analyzing class certification

in Montana, it is appropriate to use federal case law interpreting Federal Rule 23 since they are identical. *McDonald*, 261 Mont. at 400, 862 P.2d at 1154.

The court must inquire whether the class definition is sufficient to allow the class to proceed. *Polich v. Burlington Northern, Inc.*, 116 F.R.D. 258, 261 (1987). The court must find a precisely defined class exists, and the putative class representatives are members of the class. *Id.* Assuming the definition is precise enough, the court then inquires into whether the putative class satisfies the four elements of Rule 23(a): Numerosity, commonality, typicality, and adequacy of representation. *Id.* If all the elements of Rule 23(a) are met, the court must then analyze the class under Rule 23(b). *See Seiglock*, 319 Mont. at 13, 81 P.2d at 498. The particular merits of Appellants' claims are not issues to be considered in ruling on class certification. *Polich,* 116 F.R.D. at 261. However, the nature of Appellants' claims are directly relevant to a determination of whether the matters in controversy are primarily individual in character or are susceptible in proof in a class action. *Id.*

1. The putative Class lacks sufficient definition.

Appellants have not sufficiently defined the class. In attempting to provide a definition, Appellants have described the "characteristics in common with the class:"

> (1) They are all insured under health insurance plans and policies administered or operated by the defendants.
>
> (2) They have been injured through the legal fault of persons who have legal obligations to compensate them for all damages sustained.
>
> (3) They have not been made whole for their damages.

> (4) In violation of Montana law, the defendants have programmatically failed to pay benefits for their medical costs even though they have not been made whole.

Compl., ¶ 10. The proposed definition of the class is vague, ambiguous, imprecise and overbroad.

Appellants defined four "elements" of the putative class. The first element of the "class characteristics" defines the class as "insured under health insurance plans." This definition is confusing, since, for example, Ms. Diaz and Ms. Hoffman-Bernhardt were not "insureds" under a "health insurance plan," but rather covered by non-insurance self-funded employee benefit plans. *See*, Mont. Code Ann. § 2-18-812 (2009).

While both NWHS and BCBSMT operate health insurance plans independent of their respective roles with the State of Montana Employee Benefit Plan, no Appellant is a member of those insurance plans, and they are not at issue in this suit. Without properly identifying the nature of the plans and the putative class (and the proposed representative Appellants') roles in them, the court cannot ascertain the class by reference to objective criteria. *Foster v. City of Oakland*, 2009 LEXIS 1970 (*citing DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970)). The class definition determines who is entitled to notice, the nature of the relief that can be awarded, who is bound by the judgment if the class loses, and who is entitled to relief. Rule 23, M.R. Civ. P.

The second element of the proposed class characteristics is equally troublesome and will require legal and factual determinations as to whether a putative member is injured through the "legal fault" of others who have a "legal

obligation" to compensate for "all" damages sustained. Appendix 1, Compl., ¶ 10. The method typically used to make the determinations as required by this element is under the auspice of tort law. The issues of duty, causation, breach and damages for each individual putative class member will take on a life of their own. While surely some determinations may easily be made, in most other instances the determination of who fits this definition will require a "trial within a trial." The purported definition is so vague, ambiguous and imprecise as to leave it unworkable.

Likewise, the third class characteristic, given that "made whole" is a legal and factual determination, and would create an entire series of mini-trials to determine who has been "made whole" and what damages were suffered, if any. This is the most problematic aspect of the class definition, since "made whole" is a factual determination. It requires an analysis on the merits - since the class Complaint seeks damages for violating the "made whole" doctrine. Appendix 1, Compl. ¶ 9. The class cannot be defined by subjective criteria or that which requires a determination of ultimate liability. *See DeBremaecker*, 433 F.2d at 734.

The fourth element of the class "characteristic" is in the nature of the ultimate legal issues in the case, is argumentative, and therefore lacks the precision and specificity to define a class. *See* Appendix 1, Compl. ¶ 10. It requires the "made whole" determination required of the third element, and draws a legal conclusion. In order to identify the members of the class, the court must first make a legal determination and, only then, be able to determine the class, which defeats the purpose and scope of Rule 23. *See DeBremaecker*, 433 F.2d at

734. Notice could not be delivered to the class until these individual determinations were made. At best this is a "fail-safe" class, where putative class members who were "made whole" or otherwise don't fit the class definition will simply drop out and be excluded from the class. *See Gonzales v. Montana Power Co.*, 2010 MT 117, ¶ 17, __ Mont. __, __ P.3d __. Moreover, this Court's recent pronouncement in *Gonzales* establishes that issues of fraud is not suitable for class certification. As has been referenced, the Appellants pending motion for amendment contains fraud claims. *See* Appendix 2, Proposed Amended Compl. While BCBSMT opposed amendment in the lower court, and has filed a motion for summary judgment on the complaint now lodged, should the lower court agree that fraud claims are appropriately pled, the current problems with the class definition will only be exacerbated.

The class definition as revised by the lower court similarly precludes certification. The district court redefined the class as:

> [C]urrent and former State employees covered by the State Employee benefit plan, or MCHA insured, who:
>
> 1. were injured in automobile accidents caused by third parties whose auto liability insurer paid medical bills in accordance with *Ridley*:
>
> 2. are subject to the above reference exclusions from coverage;
>
> 3. were arguably not made whole by the tortfeasor, the tortfeasor's insurer, or their own automobile insurer; and
>
> 4. claim entitlement to the amount of medical benefits which would have been paid under the State of (sic) MCHA's schedule of benefits but for payment by the tortfeasor's auto liability insurer, or some other insurer.

Appendix 5, Order re: Class Action Request, p. 6

Obviously frustrated with the Appellants continually shifting class definitions, the lower court was able to extract a class definition. Acceptance of the class definition formulated by the lower court further reveals the problems with the class definition. A class definition must identify those who are members of the class. In either the district court's pronouncement, or the Appellants' varied definitions, the problem begins with the "made whole" requirement. The district court correctly determined that a class which relies upon an unknown for the definition of the class is untenable. The lower court was able to resolve with ambiguity by including the word "arguably" in the class definition, which led the court, presumably, to determine that class certification was not appropriate. Without a class definition from which the class can be determined, certification is impossible.

In conclusion, the proposed class definition is so amorphous and imprecise that determining who is member of the class is impossible.

2. The putative class lacks numerosity.

The Appellants estimate the class ranges in the "hundreds," but speculation of the numerosity requirement is not sufficient. Appellants have provided no reason, or methodology, for determining the numbers in the class, the problems with definition notwithstanding. *Polich*, 116 F.R.D. at 261. In fact, evidence was taken from Appellants' counsel, Mr. Hunt, at the certification hearing. T. 259-299. Mr. Hunt's testimony that his estimate of the numbers, based upon his own practice, is purely speculative regarding the numerosity of the State of Montana

class. The State of Montana has 32,000 members of its employee benefit plan. BCBSMT insures more than 230,000 people. While Appellants may attempt to use pleadings regarding the size of a BCBSMT fully insured class, such a comparison is simply not supported by the evidence. Comparisons are not based on an scientific calculation. Appellants offered no mathematical analysis as to numerosity, but only the self-serving testimony of one of their lawyers.[4] BCBSMT is the largest health insurer in Montana. Furthermore, due to the flawed definition of the class, there is no way to determine who, much less how many people, might be in the class. Without some substantive determination of the numbers, the numerosity is speculated at best, and thus the Appellants have failed to satisfy their burden.

3. The putative class lacks commonality.

Rule 23(a), M.R.Civ. P. requires that the class have common issues of fact or law. The *Polich* court addressed the commonality requirement. It noted that commonality is not present where each putative member brings a unique set of facts to the case. *Polich*, 116 F.R.D. at 261. In that case, the putative class was proposed to be former employees of Burlington Northern who lost their jobs in Livingston when the railroad shut down the locomotive shop. *Id.* The court found that the employees were disparate factually - some lost their jobs, some transferred, some were separated from their families, some were not. *Id.* at 261-262. The *Polich* Complaint also alleged fraud, as does the Appellants' proposed

[4] Whether this testimony disqualifies Mr. Hunt as an attorney under Rule 3.7 of the Montana Rules of Professional Responsibility is not now clear, and is not an issue in front of this Court at this time.

amended complaint, and the court noted with disfavor the factual and individual nature of the proof of the *Polich* claims. *Id.* The situation here is similar to the *Polich* case:

- Some of the putative class members may have been injured by tortfeasors, others legal damage may have been caused by contract.
- Some may have had attorneys, and/or paid fees, others not.
- Some may have given the contractual and/or statutory notice required by the plans that they intended to pursue third-party tortfeasors, while certainly others did not.
- Some may have been subject to limited or no insurance.
- Some may have had permanent injuries and others temporary injuries, or not been injured at all.
- Some may have recouped all their expenses.
- Some may have had uninsured or underinsured coverage.
- Some may have recovered from the tortfeasor personally, while others may have recovered from one or more insurance companies.
- Some may have had their claims paid the State, only to have those payments reversed or reimbursed by the providers themselves.
- And, finally, some may never have submitted claims to the State at all, instead choosing to allow the responsible party to pay for the bills he or she caused. In fact, in some cases, perhaps many, the member of the plan prefer this option. T. 203-204. Connie Welsh, who directs the State of Montana's plan, testified about a member who specifically requested that the auto carrier pay for

medicals, and that the State not pay. *Id.* Appellants' counsel testified that the submitted bills were sent to State Farm to pay the medical bills they incurred. T. 299. This is the classic case of election and coordination of benefits. It is likely that putative class members also requested that liable third-party carriers pay their medical bills, pursuant to *Ridley* or new pay provisions.

Since the decision in *Ridley,* this has been the norm rather than the exception. *See Ridley v. Guaranty Nat'l Ins. Co.*, 286 Mont. 325, 951 P.2d 987 (1998). As a result, it creates another individual inquiry as to whether the putative class members themselves requested that third parties pay their medical bills. If so, it certainly creates uncertainty about whether members of the class - and their representatives - have waived their state benefits in favor of the responsible third party paying their incurred medical costs.

While not before the Court, as indicated the proposed amended complaint adds bad faith, punitive damages and fraud claims. Appendix 2. As the district court realized, determination of bad faith and fraud claims are individual in nature - whether and what duty each of the individual defendants may have had, the manner in which their claims applied, and whether statutory bad faith even applies are all factors which need to be determined individually. For example, what was each putative member told, and what did each member rely upon? *See, e.g., Newell v. State Farm Gen. Insur. Co.*, 118 Cal. App. 4th, 1094, 1102-1103 (Cal. App. 2004) (holding class certification not applicable because of the individualized proof required in bad faith actions.)

Appellants attempt to rely upon *Ferguson v. Safeco*, in modeling their

complaint as a basis, arguably "*the basis,*" for class certification. 2008 MT 109, 342 Mont. 380, 180 P.3d 1164. However, the critical difference between Appellants' complaint and *Ferguson* is the requested relief and class identification. In *Ferguson* the plaintiff alleged that while it sought declaratory relief to compel Safeco to adhere to the made whole doctrine when adjudicating claims, it did not seek individualized made whole entitlements. *Id.* at ¶ 15. Importantly, in the *Ferguson* case Safeco sought subrogation (i.e., "pay and pursue") as against each member of the class. Safeco reached out to liable insurance companies to seek subrogation in property damage cases. Each member of the class paid a deductible to Safeco to recover the value of their vehicle, so an individualized "made whole" determination was not necessary. Appendix 5, Order, p. 14.

Appellants in this case are seeking individualized determinations and damages arising as a result just as a matter of identifying the class. The Appellants have couched some of the relief sought as "injunctive" in nature, but ultimately seek an order:

> 5. [R]equiring defendants to determine the amount of insurance benefits they have wrongfully withheld from each member of the class.
>
> 6. For an order that after calculation of the amounts wrongfully withheld, the defendants be required to immediately pay the medical bills incurred by the individual member plus interest thereon.

Appendix 1, Compl., p. 15. In order to achieve the relief sought, individualized determinations must be made with regard to each individual class member. Differently than in *Ferguson*, in some cases the State was never made aware that a

third-party had paid medical bills. T. 203-04. In many cases, medical providers never submitted bills to the State because the bills were directed by members to auto carriers. As Tina Peterson testified, the auto carriers paid the full charges - rather than the negotiated rate - which means the providers were paid more than if the State's plan had paid the bill. T. 115-116. Obviously, the State could not have "programmatically" denied payment for bills that were never submitted. Similarly, the State often received reimbursements from providers for bills that it did pay on behalf of members. In that case, again, the State could not have "programmatically" schemed to deny coverage where it actually paid the bills submitted to it. If such claims are allowed, a "mini-trial" must be held on the issue of "made whole," as well as the fraud and bad faith claims for each putative class member. Of course, under the class definition a mini-trial must take place for the court to be able to determine who is a member.

Notably, the *Ferguson* case involves subrogation by an auto insurer. Appellants have attempted to overlook this very critical, if subtle, distinction. Subrogation is defined as the substitution of one person in the place of another with reference to a lawful claim, demand or right, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim. BLACK'S LAW DICTIONARY 1427 (6th Ed. 1990).

The Court has defined subrogation as "the substitution of one party for another whose debt the party pays, entitling the paying party to rights, remedies, or security that would otherwise belong to the debtor." *Thayer v. Uninsured Employers' Fund*, 1999 MT 304, ¶ 17, 297 Mont. 179, 991 P.2d 447 (citing

authority). It "is the substitution of another person in the place of creditor, so that the person substituted will succeed to the rights of the creditor in relation to the debt or claim and is an act of the law growing out of the relation of the parties to the original contract of insurance, and the natural justice or equities arising from the fact that the insurer has paid the insured. . . ." *Youngblood v. American States Insurance*, 262 Mont. 391, 395, 866 P.2d 203 (1993) (citing authority). "The key aspect is that the insurer has been paid for the assumption of the liability for the claim, and that where the claimant has not been made whole, equity concludes that it is the insurer which should stand the loss, rather than the claimant." *Zacher v. American Ins. Co.*, 243 Mont. 226, 230-31, 794 P.2d 335 (1990).

Under Montana law, subrogation arises only where an insurer has assumed the risk under an insurance policy and paid a claim pursuant to the risk assumed under the insurance policy. Having assumed the risk and accepted premium for assumption of the risk, an insurer is permitted to recover claim payments made only if the insured has been made whole. However, in this case, the State does not take the risk for accident related medical expenses when those medical expenses are paid for by auto med coverage or *Ridley* advances. The State has not assumed or "been paid for the assumption of the liability for the claim." Subrogation occurs, by definition, after a claim has been paid, and the subrogor seeks to replace the money it has expended on behalf of the subrogee. In other words if subrogation had occurred, BCBSMT, on behalf the State of Montana, would have sought money from Ms. Diaz for claims that were paid. Clearly, this is the not the case, and the doctrine of subrogation has no place in this matter. Under the terms

of the policy, if there was an auto med pay exclusion, the State pays the claim and seeks nothing from Ms. Diaz (or any member of a putative class). The district court correctly characterized this as a coordination of benefits. Appendix 5, Order, p. 8.

Because there is not a sufficient nexus of common issues of fact or law, Appellants' proposed class lacks the commonality adequate for certification.

4. The putative class lacks typicality.

A putative class must have a satisfy the requisite nexus between the injury suffered by the Appellants and the injury suffered by the class. *McDonald*, 261 Mont. at 402, 862 P.2d at 1156. The typicality requirement is designed to assure the named representatives's interests are aligned with those of the class. *Id.* (*citing Jordan v. County of Los Angeles*, 669 F.2d 1311, 1321 (9th Cir. 1982)). A named plaintiff's claim is typical if it stems from the same event, practice or course of conduct that forms the basis of the class claims and is based upon the same legal or remedial theory. *Id.* Generally, in the application of the typicality requirement of Rule 23(a)(3), the plaintiffs are not entitled to bring a class action against defendants with whom they have had no dealings. *Murer v. Montana State Compensation Mut. Ins. Fund*, 257 Mont. 434, 438, 849 P.2d 1036, 1038 (*citing LaMar v. H&B Novelty and Loan Co*, 489 F.2d 461, 464 (9th Cir. 1973)).

Other courts, including the United States Supreme Court, have concluded that a plaintiff cannot represent a class of whom they are not a part. *Bailey v. Patterson*, 369 U.S. 31 (1962); *see also, Easter v. American West Fin.*, 381 F.3d 948, 962 (9th Cir. 2004)(holding that debtors who sued banking institutions could

not sue those who never loaned named plaintiff's money); *Thompson v. Board of Ed. of Romeo Community Schools*, 709 F.2d 1200, 1204-05 (6th Cir. 1983)(holding a class of teachers may not sue a class of defendants by whom they had not been employed). The court in *LaMar* ruled that a plaintiff cannot represent a class against defendants against whom the plaintiff has no cause of action and from whose hands she suffered no injury. *LaMar*, 489 F.2d at 466.

In this case, as in *Murer*, the Appellants have disparate connection, if they are connected at all, with the Appellees. For example, Ms. Hoffman-Bernhardt has no connection with either BCBSMT or MCHA. Similarly, Ms. Diaz has no connection with either MCHA or NWHS. Importantly, no Appellant contracts with BCBSMT, and since the class "characteristics" include those who are insured under health insurance plans operated or administered by the Appellees, it would necessarily include insurance plans to which no Appellant has a connection or relationship.

Here, Appellants' connections with the Appellees are so distinct and unrelated that the class lacks the typicality necessary for certification.

5. The representative Appellants do not adequately represent the proposed class.

Because the representative Appellants do not have the same claims, or even standing, against all the Appellees, they cannot possibly adequately represent the class. Because the representative Appellants have varying claims against varying party-defendants, the district court was right to deny certification.

6. The class does not satisfy Rule 23(b).

Assuming *arguendo* that the each element of Rules 23(a) is met, the Plaintiff still must carry the burden under Rule 23(b). The Appellants' request for certification relies, like the class in *Ferguson*, on Rule 23(b)(2), which states, "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Like Appellant's reliance on *Ferguson* as a whole, this reliance is mislaid.

As referred to earlier, *Ferguson* sought purely declaratory relief. Appellants' Complaint, and Amended Complaint, seek "injunctive" relief, but the injunctive relief is not primarily to prevent the Appellees from engaging in any action, but to make a damages determination regarding Appellant's proposed damages. *See* Appendix 1, Compl., p. 15; Appendix 2, Proposed Amended Compl., pp. 26-27. As the court recognized in *Burton v. Mountain West Bureau Mut. Ins. Co.*, 214 F.R.D. 598, 610 (D. Mont. 2003), where damages are portrayed as injunctive relief, as is the case here, seeking an order compelling payment of money, is nothing more than a request for money damages. Incidental monetary damages appropriate under Rule 23(b)(2) certification should arise from wrongs to the class as a whole, not from circumstances that require fact finding on individual class members' cases. *Id.* Additionally, any declaratory ruling would necessarily require fact finding for each individual class member and for punitive damage claims. *Id.*

Here, it is clear that individual fact finding will be crucial to establish the

claims of the class. Whether each member is "made whole," whether and what representations were made to them by which Appellee, if any, and relied upon, if at all, and whether and what bad faith allegations and other issues arose with regard to each class member will require the kind of individualized determinations that *Burton* proscribes. For this reason certification under Rule 23(b)(2) is inappropriate.

a. If the statutory subrogation provisions control, more individualized determinations are necessary.

Appellants assert that the statutory subrogation provisions of § 2-18-902 mandate that certain requirements must be met before the State can enforce a subrogation right. First, the State has no obligation, with regard to its unchallenged exclusionary clauses to complete any analysis before it applies an exclusion. Assuming, *arguendo*, the State's exclusion is subject to the same analysis as the 97 proposed policy forms at issue in *Morrison v. Blue Cross Blue Shield of Montana, Inc.*, then the application of § 2-18-902 requires even further individualized determinations. This statutory section sets out the requirements of the State and its members with regard to their respective subrogation rights.

2-18-902 Notice -- shared costs of third-party action -- limitation.

> (1) If an insured intends to institute an action for damages against a third party, the insured shall give the insurer reasonable notice of the intention to institute the action.
>
> (2) The insured may request that the insurer pay a proportionate share of the reasonable costs of the third-party action, including attorney fees.
>
> (3) An insurer may elect not to participate in the cost of the action. If an election is made, the insurer waives 50% of any subrogation rights granted to it by 2-18-901.

> (4) The insurer's right of subrogation granted in 2-18-901 may not be enforced until the injured insured has been fully compensated for the insured's injuries.

Section 2-18-902, MCA (2009).

If this statutory section controls, each putative class member must demonstrate whether he or she intended to institute an action, and whether notice was given to the State of Montana with regard to that intention. Moreover, even if *Morrison* would to somehow apply to a governmental self-insured employee benefit plan, the State had no notice that the exclusions in its plans would be transformed into *de facto* subrogation. The State does not even submit its plan for approval to the Commissioner. T. 164. However, each putative class member would have to demonstrate compliance with Section 2-18-902, MCA, before it may be in a position to recover, leading to additional individualized determinations..

b. Certification under Rule 23(b)(3) has been waived, but is not appropriate in any event.

Appellants have not made substantive arguments that certification under Rule 23(b)(3) is appropriate, and it is therefore waived. *See,* Appendix 4, Appellants' Memorandum in Support of Class Certification, pp. 20-21 ("Like Ferguson, the Appellants believe the case is also appropriate for certification under Rule 23(b)(3)"). However, the individualized nature of the determination regarding determination of class members and computation of damages for the class do not "predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and

efficient adjudication of the controversy." Rule 23(b)(3), M.R.Civ.P.

The predominance requirement is more demanding than the commonality requirement of Rule 23(a). *Burton*, 214 F.R.D. at 611. Implicit in the satisfaction of the predominance test is the notion that the adjudication of common issues will help achieve judicial economy. *Id.* Here, the series of mini-trials which would be required to not only determine class damages, but merely to clarify and identify membership in the proposed class makes certification under 23(b)(3) improper. The district court was correct when it concluded that such claims "will obviously require individualized review" as to whether the claimant is made whole. Appendix 5, Order, p. 9. These individualized determinations will predominate over any common issues. The district court's denial of class certification was proper, and should be affirmed.

C. The district court did not improperly delve into the merits

Appellants claim that the district court improperly delved into the merits of the class claim in denying a class. This Court has recently indicated what a district court may consider when ruling on a motion to certify a class. In *Mattson v. Mont. Power Co.*, this Court explained:

> (1) a district judge may certify a class only after making determinations that each of the Rule 23 requirements has been met; (2) such determinations can be made only if the judge resolves factual disputes relevant to each Rule 23 requirement and finds that whatever underlying facts are relevant to a particular Rule 23 requirement have been established and is persuaded to rule, based on the relevant facts and the applicable legal standard, that the requirement is met; (3) the obligation to make such determinations is not lessened by overlap between a Rule 23 requirement and a merits issue, even a merits issue that is identical with a Rule 23 requirement; (4) in making such determinations, a district judge should not assess any aspect of the merits unrelated to a Rule 23 requirement; and (5) a district judge has

> ample discretion to circumscribe both the extent of discovery concerning Rule 23 requirements and the extent of a hearing to determine whether such requirements are met in order to assure that a class certification motion does not become a pretext for a partial trial of the merits.

2009 MT 286, ¶ 67, 352 Mont. 212, 215 P.3d 675.

The district court made the necessary factual inquiries into the Rule 23 motion, but did not make any determinations about the merits. The merits of the pled action would include whether the State plan was unjustlyenriched by the application of the terms of its plan as it relates to payments made, and whether the State violated the contract with its members in the application of the plan. Here, the court did not impermissibly inquire into the merits of the Appellants' claims. It made no decision about whether the Appellants would ultimately prevail on their claim for declaratory relief. It made no decision about whether the State had been unjustly enriched, or whether the State breached the contract. The lower court specifically found it did not need to make a merits determination. It stated "In determining whether class certification is appropriate, this Court does not need to rule as to the merits of each Plaintiff's claims, or their request for declaratory ruling or partial summary judgment." Appendix 5, Order at p. 9. Here, the district court looked only insofar as to determine whether class certification was appropriate, and a review beyond the face of the complaint was proper. *See Mattson v. Mont. Power Co.,* 2009 MT 286, ¶ 67, 352 Mont. 212.

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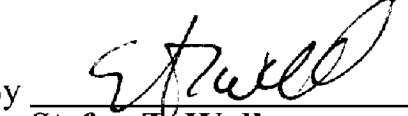
VII. CONCLUSION

BCBSMT respectfully requests that this Honorable Court affirm the decision of the district court denying class certification.

Respectfully submitted this 11th day of June 2010.

MCMAHON LAW FIRM, PLLC

By 

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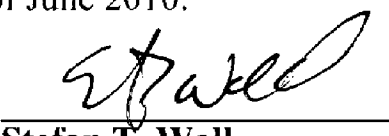
CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that the foregoing is proportionally spaced using 14 point Times New Roman font; is double spaced; and the word count calculated by WordPerfect X4 for Windows, contains 7,779 words and is not more than 29 pages, excluding certificate of service and certificate of compliance.

Respectfully submitted this 11th day of June 2010.



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CERTIFICATE OF SERVICE BY MAIL

I HEREBY CERTIFY that a copy of the foregoing **BLUE CROSS BLUE SHIELD OF MONTANA, INC.'S RESPONSE BRIEF** was served upon the following by mailing a true and correct copy thereof on June 11, 2010, addressed as follows:

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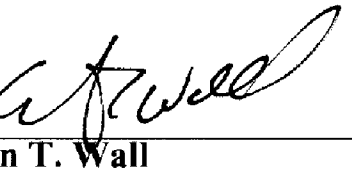

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